December 2005

Update: Michigan Circuit Court Benchbook

CHAPTER 2

Evidence

Part V—Exhibits (MRE Articles IX and X)

2.48 Writings and Documents

B. Admissibility of Other Evidence of Contents—MRE 1004

Insert the new subsection as indicated above after the existing text on page 126:

The "best evidence" requirement is subject to exceptions authorized by other rules of evidence or by statute. MRE 1004 specifically states that

> "[t]he original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if—
>
> * * *
>
> **"(4) Collateral Matters.** The writing, recording, or photograph is not closely related to a controlling issue."

In *People v Girard*, ___ Mich App ___, ___ (2005), the trial court admitted into evidence sexual images of children found on the defendant's computer. The defendant argued that admission of the images violated MRE 1002—the "best evidence" rule—because witnesses identified the images only "as being similar to the images they had seen on defendant's computer." However, testimony established that the defendant looked at sexually explicit images on his computer before or during the sexual conduct with the complainant. *Girard, supra* at ___. According to the Court, this testimony about the computer images explained the circumstances under which the sexual assaults occurred, and therefore, with regard to the CSC-I charges against the

defendant, the images of child pornography found on the defendant's computer were a collateral matter unrelated to a controlling issue. Because of this, other evidence of the contents of the images—testimony from witnesses who watched the defendant look at the images or to whom the defendant sent the images via email—was properly admitted against the defendant pursuant to MRE 1004's exception to the "best evidence" rule. *Girard, supra* at ___.

CHAPTER 4

Criminal Proceedings

Part I—Preliminary Proceedings (MCR Subchapters 6.000 and 6.100)

4.5 Attorneys—Waiver of Counsel

A. Right of Self-Representation

Insert the following text after the August 2005 update to page 383:

By order issued November 9, 2005, the Michigan Supreme Court reversed a Court of Appeals judgment (briefly discussed below) involving a defendant who was denied permission to represent himself at trial. *People v Chaaban (Chaaban I)*, ___ Mich ___ (2005). According to the Michigan Supreme Court, in violation of *Faretta v California*, 422 US 806 (1975), "[t]he trial court erroneously denied defendant's unequivocal request to represent himself[.]" *Chaaban I, supra* at ___.

In *People v Chaaban (Chaaban II)*, unpublished opinion per curiam of the Court of Appeals, decided March 29, 2005 (Docket No. 253513), the Court of Appeals concluded that the trial court did not err when it refused to permit the defendant to represent himself at trial. According to the Court of Appeals, it was plain that "defendant's request to represent himself changed from unequivocal to equivocal after listening to the court's discussion about the risks of self-representation and its inquiry regarding [his] competence." *Chaaban II, supra* at ___.

Specifically, the Court of Appeals noted:

> "Defendant Chaaban went from certainty when he stated that he 'could defend [him]self with the truth' to a probability that he 'could probably effectively handle [him]self' during trial. Defendant Chaaban then finally concluded, at the close of the exchange with the trial court, '[w]ell, I don't know what to do." *Chaaban II, supra* at ___.

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.18 Separate or Joint Trial

A. One Defendant—Multiple Charges

Insert the following text before subsection (B) on page 324:

See also *People v Girard*, ___ Mich App ___, ___ (2005), where the trial court properly denied the defendant's request to sever the CSC-I charges from the charges of possession of child sexually abusive material. In *Girard*, the evidence showed that the conduct underlying the charges against the defendant was plainly accounted for by the language of MCR 6.120(B)—"offenses are related if they are based on the same conduct or a series of connected acts or acts constituting part of a single scheme or plan." Testimony at the defendant's trial established "that defendant used child pornography for stimulation before and during his sexual abuse of the complainant and thus was part of his modus operandi." *Girard, supra* at ___.

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.18 Separate or Joint Trial

C. Standard of Review

On page 326, add the following text to the only paragraph in this section:

However, whether the charges are related is a question of law that is reviewed de novo. *People v Girard,* ___ Mich App ___, ___ (2005), citing *People v Tobey,* 401 Mich 141, 153 (1977). MCR 6.120(B) is a codification of the Supreme Court's decision in *Tobey. People v Abraham,* 256 Mich App 265, 271 (2003).

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.21 Search and Seizure Issues

G. Is Exclusion the Remedy if a Violation is Found?

1. Good-Faith Exception

Insert the following text after the October 2005 update to page 348:

The good-faith exception to the exclusionary rule does not apply to evidence obtained pursuant to a search warrant based on an affiant's admitted and purposeful false statements. *People v McGee*, ___ Mich App ___, ___ (2005).

In *McGee*, the defendant argued that evidence obtained in 1992 through the execution of an illegal search warrant should not be admissible against him in a 1998 criminal proceeding. *McGee, supra* at ___. Citing *Elkins v United States*, 364 US 206 (1960), and *United States v Janis*, 428 US 433 (1976), the *McGee* Court agreed:

> "Although much of the cited text is dicta with respect to the instant issue, it indicates that evidence obtained by a law enforcement officer with respect to any criminal proceeding falls within the officer's zone of primary interest. It also appears to suggest that the 1992 evidence should have been excluded. . . . Here, because the evidentiary hearing with respect to the 1992 search indicated that the officer who swore to the affidavit for the warrant provided false statements, the violation was substantial and deliberate, and [the evidence] should have been suppressed." *McGee, supra* at ___ (footnote and citations omitted).

CHAPTER 4
Criminal Proceedings

Part V—Trials (MCR Subchapter 6.400)

4.48 Jury Instructions

C. Instructions on Lesser Included Offenses

1. Necessarily Included Lesser Offenses

Insert the following text after the May 2005 update to page 433:

Where "the only difference [] between the possession with intent to deliver offenses is the amount of the illegal substance, it [is] not possible to commit the greater offense without committing the lesser offense." *People v McGee*, ___ Mich App ___, ___ (2005). However, the *McGee* Court noted that this does not necessarily mean that a trial court must give instructions for all possible amounts if the defendant so requests.

In *McGee*, the trial court instructed the jury on two different possession with intent to deliver offenses—possession with intent to deliver 225 to 650 grams of cocaine and possession with intent to deliver more than 650 grams of cocaine. *McGee, supra* at ___. The defendant argued that the trial court should instruct the jury on the necessarily included lesser offense of possession with intent to deliver 50 to 225 grams of cocaine. The Court disagreed and emphasized the controlling rule as expressed in *People v Cornell*, 466 Mich 335, 352 (2002):

> "[A]n instruction on the lesser offense need only be given if a rational review of the evidence indicates that the element distinguishing the lesser offense from the greater offense is in dispute." *McGee, supra* at ___.

The defendant argued that the lesser instruction was appropriate because of all the cocaine discovered during the search of the house and garage, the jury could have found him guilty of possessing only the amount of cocaine contained in the pocket of the defendant's coat, which was inside the house. Answered the *McGee* Court:

> "[D]efendant did not argue or present evidence that he possessed a lesser amount. Therefore, a rational view of the evidence does not support defendant's claim that the amount of cocaine possessed was in dispute. *Cornell, supra*." *McGee, supra* at ___ (footnote omitted).

November 2005

Update: Michigan Circuit Court Benchbook

CHAPTER 1

General Rules Governing Court Proceedings

1.1 Access to Court Proceedings and Records

F. Limits on Access to Court Records—MCR 8.119(F)

Insert the following text at the top of page 5:

Transcripts generated from court proceedings and filed with the court clerk "are a part of the record for purposes of a sealing order" issued pursuant to MCR 8.119(F). *UAW v Dorsey*, ___ Mich App ___, ___ (2005).

CHAPTER 2

Evidence

Part IV—Hearsay (MRE Article VIII)

2.40 Hearsay Exceptions

I. Declarant Unavailable—MRE 804, MCL 768.26

Insert the following text after the June 2005 update to page 112:

A non-testifying serologist's notes and lab report are "testimonial statements" under *Crawford v Washington*, 541 US 36 (2004). *People v Lonsby*, ___ Mich App ___, ___ (2005). In *Lonsby*, a crime lab serologist who did not analyze the physical evidence testified regarding analysis that was performed by another serologist. The testimony included theories on why the non-testifying serologist conducted the tests she conducted and her notes regarding the tests. In *Crawford,* "the Court stated that pretrial statements are testimonial if the declarant would reasonably expect the statement will be used in a prosecutorial manner and if the statement is made 'under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" *Lonsby, supra* at ___, quoting *Crawford, supra* at 51–52. The Court of Appeals found that because the serologist would clearly expect that her notes and lab report would be used for prosecutorial purposes, the information satisfies *Crawford*'s definition of a "testimonial statement." The *Lonsby* Court stated:

> "Because the evidence was introduced through the testimony of Woodford, who had no first-hand knowledge about Jackson's observations or analysis of the physical evidence, defendant was unable, through the crucible of cross-examination, to challenge the objectivity of Jackson and the accuracy of her observations and methodology. Moreover, because Woodford could only speculate regarding Jackson's reasoning, defendant could not question or attack Jackson's preliminary test results or the soundness of her judgment in failing to conduct additional tests. Therefore, the introduction of Jackson's hearsay statements through the testimony of Woodford falls squarely within *Crawford*'s prohibition of testimonial hearsay that is reasonably expected to be used by the prosecution at trial. Because there is no showing that Jackson was unavailable to testify and that defendant had a prior opportunity to cross-examine her, the admission of the evidence violated defendant's Confrontation Clause rights, as defined by the United States Supreme Court in *Crawford*." [Footnotes omitted.] *Lonsby, supra* at ___.

CHAPTER 3

Civil Proceedings

Part II—Pretrial Motions (MCR Subchapters 2.100 and 2.200)

3.24 Summary Disposition

B. Timing

Insert the following text immediately before sub-subsection (1) on page 175:

In an unpublished decision, the Court of Appeals has held that a court may set deadlines for motions for summary disposition pursuant to MCR 2.401(B)(2)(a)(ii), as that more specific rule controls over the general rule that motions under MCR 2.116 may be filed at any time. *Kemerko Clawson LLC v RXIV Inc,* unpublished opinion per curiam of the Court of Appeals, decided October 20, 2005 (Docket No. 255887). The court questioned the conclusion in *Gerling Konzern Allgemeine Versicherungs AG v Lawson,* 254 Mich 241, 248 (2002), rev'd 472 Mich 44 (2005), cited below.

CHAPTER 3

Civil Proceedings

Part V—Trial (MCR Subchapter 2.500)

3.48 Jury Deliberation

A. Materials in Jury Room

On page 231, before the final paragraph in this subsection, add the following text:

If, after the jury returns its verdict, the court discovers that material was provided to the jury that was not admitted into evidence, before addressing a possible remedy, the court should conduct a hearing to determine whether the jury reviewed the non-admitted materials. *Mays v Schell,* ___ Mich App ___, ___ (2005). A jury's consideration of documents that were not admitted into evidence "'does not constitute error requiring reversal unless the error operated to substantially prejudice the party's case.'" *Id.* at ___, quoting *Phillips v Diehm,* 213 Mich App 389, 402–03 (1995). This includes a determination whether the documents were actually considered by the jury in reaching a verdict. *Mays, supra* at ___, quoting *People v McCrea,* 303 Mich 213, 266 (1942). In *Mays,* during deliberations in a medical malpractice case, the jury requested the plaintiff's complete medical records. Inadvertently, the jury was provided with defense counsel's banker's box, which contained numerous items about the case that were not admitted at trial: other medical records, deposition transcripts, deposition summaries, memos to the file, correspondence with the client and the client's insurance company, and defense counsel's notes. The Court of Appeals overturned the trial court's decision granting a new trial "because the record does not reflect that the jury in fact looked at, let alone relied on, the materials not admitted into evidence . . . ."

CHAPTER 4

Criminal Proceedings

Part V—Trials and Post-Trial Proceedings (MCR Subchapter 6.400)

4.41 Confrontation

A. Defendant's Right of Confrontation

4. Unavailable Witness

Insert the following text after the July 2005 update to page 415:

A non-testifying serologist's notes and lab report are "testimonial statements" under *Crawford v Washington*, 541 US 36 (2004). *People v Lonsby*, ___ Mich App ___, ___ (2005). In *Lonsby*, a crime lab serologist who did not analyze the physical evidence testified regarding analysis that was performed by another serologist. The testimony included theories on why the non-testifying serologist conducted the tests she conducted and her notes regarding the tests. In *Crawford,* "the Court stated that pretrial statements are testimonial if the declarant would reasonably expect the statement will be used in a prosecutorial manner and if the statement is made 'under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" *Lonsby, supra* at ___, quoting *Crawford, supra* at 51–52. The Court of Appeals found that because the serologist would clearly expect that her notes and lab report would be used for prosecutorial purposes, the information satisfies *Crawford*'s definition of a "testimonial statement." The *Lonsby* Court stated:

> "Because the evidence was introduced through the testimony of Woodford, who had no first-hand knowledge about Jackson's observations or analysis of the physical evidence, defendant was unable, through the crucible of cross-examination, to challenge the objectivity of Jackson and the accuracy of her observations and methodology. Moreover, because Woodford could only speculate regarding Jackson's reasoning, defendant could not question or attack Jackson's preliminary test results or the soundness of her judgment in failing to conduct additional tests. Therefore, the introduction of Jackson's hearsay statements through the testimony of Woodford falls squarely within *Crawford*'s prohibition of testimonial hearsay that is reasonably expected to be used by the prosecution at trial. Because there is no showing that Jackson was unavailable to testify and that defendant had a prior opportunity to cross-examine her, the admission of the evidence

violated defendant's Confrontation Clause rights, as defined by the United States Supreme Court in *Crawford*." [Footnotes omitted.] *Lonsby, supra* at ___.

CHAPTER 4

Criminal Proceedings

Part V—Trials and Post-Trial Proceedings (MCR Subchapter 6.400)

4.49 Jury Deliberation

A. Materials in Jury Room

Add the following text immediately before subsection (B):

If, after the jury returns its verdict, the court discovers that material was provided to the jury that was not admitted into evidence, before addressing a possible remedy, the court should conduct a hearing to determine whether the jury reviewed the non-admitted materials. *Mays v Schell,* ___ Mich App ___, ___ (2005). A jury's consideration of documents that were not admitted into evidence "'does not constitute error requiring reversal unless the error operated to substantially prejudice the party's case.'" *Id.* at ___, quoting *Phillips v Diehm,* 213 Mich App 389, 402–03 (1995). This includes a determination whether the documents were actually considered by the jury in reaching a verdict. *Mays, supra* at ___, quoting *People v McCrea,* 303 Mich 213, 266 (1942). In *Mays,* during deliberations in a medical malpractice case, the jury requested the plaintiff's complete medical records. Inadvertently, the jury was provided with defense counsel's banker's box, which contained numerous items about the case that were not admitted at trial: other medical records, deposition transcripts, deposition summaries, memos to the file, correspondence with the client and the client's insurance company, and defense counsel's notes. The Court of Appeals overturned the trial court's decision granting a new trial "because the record does not reflect that the jury in fact looked at, let alone relied on, the materials not admitted into evidence . . . ."

CHAPTER 4

Criminal Proceedings

Part VI—Sentencing and Post-Sentencing (MCR Subchapters 6.400 and 6.500)

4.58 Sentencing—Sexually Delinquent Person

C. Application

Add the following text to the end of the first paragraph on page 463:

Alternatively, the court may place the defendant on probation. *People v Buehler,* ___ Mich App ___, ___ (2005).

October 2005

Update: Michigan Circuit Court Benchbook

CHAPTER 2

Evidence

Part III—Witnesses, Opinions, and Expert Testimony (MRE Articles VI and VII)

2.31 Self-Incrimination

B. Assertion of Privilege

After the first quote on page 83, insert the following text:

A witness may invoke his or her Fifth Amendment privilege where the danger of self-incrimination is "real and probable" not "imaginary and unsubstantial." *Davis v Straub*, ___ F3d ___, ___ (CA 6, 2005), quoting *Brown v Walker*, 161 US 591, 608 (1896). In *Davis*, a murder witness provided one *Mirandized* and one non-*Mirandized* statement to police, both of which tended to exonerate the defendant. When the defense attorney called the witness to testify at trial, the prosecutor asked the court to inform the witness of his privilege against self-incrimination because he was still a suspect. The trial court appointed an attorney for the witness, and after consulting with the attorney, the witness chose not to testify. After concluding that the witness could incriminate himself by admitting to his presence at the scene of the murder, the trial court allowed the witness to assert a blanket Fifth Amendment privilege and refuse to answer any questions.

The United States Court of Appeals for the Sixth Circuit held that the trial court erred in deciding that "[the witness] could avoid any questions because he had a reasonable basis to fear self-incrimination, and invoke a blanket assertion of the Fifth Amendment." In light of the fact that the witness had provided a *Mirandized* statement that could be used against him if he was charged with a crime, the *Davis* Court concluded that if required to testify to

his presence at the murder scene, the witness could not incriminate himself more than he had already done; therefore, the witness did not have a "real and probable" apprehension of further incriminating himself.

Finally, the Court noted the importance of balancing a defendant's Sixth Amendment rights with a witness's privilege against self-incrimination:

> "[U]nlike cases where the individual invoking the privilege is also the defendant, in the instant case the Sixth Amendment creates a countervailing right in [the defendant] that requires the court to compel [the witness] to respond to questions that raise only 'imaginary and unsubstantial risk' of further incrimination. Questions regarding [the witness]'s presence at the scene fall into this category, and it was a violation of [the defendant]'s Sixth Amendment rights not to compel [the witness] to respond to them."

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.21 Search and Seizure Issues

G. Is Exclusion the Remedy if a Violation Is Found?

1. Good-Faith Exception

Insert the following case summary after the June 2005 update to page 348:

In determining whether the good-faith exception applies to a search conducted pursuant to an invalid search warrant, *United States v Laughton** does not establish a blanket prohibition against a reviewing court's consideration of evidence not included in the four corners of the affidavit on which the warrant was based. *United States v Frazier*, ___ F3d ___ (CA 6, 2005). According to *Frazier*, information known to a police officer *and* provided to the issuing magistrate—even if it was not included in the four corners of the affidavit in support of the warrant—may be considered in determining whether an objectively reasonable officer was justified in relying on the warrant.

*409 F3d 744 (CA 6, 2005).

The Sixth Circuit concluded that the facts in *Frazier* were distinguishable from the facts in *Laughton* because "[*Laughton*] gives no indication that the officer who applied for the search warrant provided the issuing magistrate with the information omitted from the affidavit." *Frazier*, *supra* at ___. For purposes of determining whether the good-faith exception should apply to an unlawful search, *Laughton* prohibits the consideration of information not found within the four corners of the affidavit when there is no evidence that the information was provided to the magistrate who issued the warrant. According to *Frazier*, information known to an officer but not found in the supporting affidavit may be considered if the information was revealed to the issuing magistrate.

September 2005

Update: Michigan Circuit Court Benchbook

CHAPTER 1

General Rules Governing Court Proceedings

1.1 Access to Court Proceedings and Records

F. Limits on Access to Court Records—MCR 8.119(F)

Insert the following text on page 5 immediately before Section 1.2:

When a party files an appeal in a case where the trial court sealed the file, the file remains sealed while in the possession of the Court of Appeals. MCR 7.211(C)(9)(a). Any requests to view the sealed filed will be referred to the trial court. *Id.* MCR 8.119(F) also governs the procedure for sealing a Court of Appeals file. MCR 7.211(C)(9)(c).

August 2005

Update: Michigan Circuit Court Benchbook

CHAPTER 2

Evidence

Part III—Witnesses, Opinions, and Expert Testimony (MRE Articles VI and VII)

2.35 Medical Malpractice—Expert Testimony

D. Exceptions to Requirement of Expert Testimony

Insert the following text on the bottom of page 97:

For a good discussion of res ipsa loquitur and expert testimony in a medical malpractice action, see *Woodard v Custer*, ___ Mich ___ (2005)("whether a leg may be fractured in the absence of negligence when placing an arterial line or a venous catheter in a newborn's leg is not within the common understanding of the jury, and, thus, expert testimony is required").

CHAPTER 3

Civil Proceedings

Part III—Discovery (MCR Subchapter 2.300)

3.29 Independent Medical Examinations

A. Generally

Insert the following text on the bottom of page 191:

MCL 500.3151 of the no-fault act states that "[w]hen the mental or physical condition of a person is material to a claim that has been or may be made for past or future personal protection insurance benefits, the person shall submit to mental or physical examination by physicians." MCR 2.311(A) allows the court to order independent medical examinations and place conditions on the examinations. In *Muci v State Farm Mutual Auto Ins Co,* ___ Mich App___, ___ (2005), the Court of Appeals held that MCL 500.3151 does not conflict with MCR 2.311; therefore, a court in a no-fault action may order a person to undergo a medical examination pursuant to MCL 500.3151 and impose reasonable conditions upon the examination pursuant to MCR 2.311.

CHAPTER 3

Civil Proceedings

Part IV—Resolution Without Trial (MCR Subchapter 2.400)

3.33 Case Evaluation

H. Rejecting Party's Liability for Costs — MCR 2.403(O)

5. Interest on Sanctions

On pages 203-204 replace the paragraph in this sub-subsection with the following text:

Interest on mediation* sanctions must be calculated from the date the complaint was filed. *Ayar v Foodland Distributors*, 472 Mich 713, 717-718 (2005). In *Ayar*, the Court applied the judgment interest statute, MCL 600.6013(8), to mediation sanctions ordered pursuant to MCR 2.403(O). MCL 600.6013(8) states that the interest calculation "on a money judgment recovered in a civil action is calculated at 6-month intervals from the date of filing the complaint . . . ." The Court found that MCL 600.6013 expressly applies to "attorney fees and other costs," and MCL 600.6013(8) does not make an exception for attorney fees and costs ordered as mediation sanctions pursuant to MCR 2.403(O). Therefore, interest on attorney fees and costs ordered pursuant to MCR 2.403(O) must be calculated from the time the complaint was filed.

*The case refers to "mediation" sanctions. However, the court rule was amended in 2000, changing "mediation" to "case evaluation." *Ayar, supra* at 714 n 1.

CHAPTER 3

Civil Proceedings

Part V—Trial (MCR Subchapter 2.500)

3.38 Jury Selection

G. Peremptory Challenges

Delete the last sentence on page 214 and insert the following text on the top of page 215:

A prima facie showing of discrimination under *Batson* does not require a showing that peremptory challenges were more likely than not based on impermissible group bias. *Johnson v California*, 545 US ___, ___ (2005). The first step in a *Batson* challenge requires the opponent of the challenge to show that members of a cognizable racial group are being peremptorily removed. In *Johnson*, California required "at step one that 'the objector [] show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias.'" The Supreme Court found that California's "'more likely than not' standard is an inappropriate yardstick by which to measure the sufficiency of a prima facie case." The Court held that "a defendant satisfies the requirements of *Batson's* first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred."

Replace the sentence at the top of page 215 with the following language:

A trial judge may sua sponte raise a *Batson* issue to ensure the equal protection rights of individual jurors. *People v Bell*, ___ Mich ___, ___ (2005).

CHAPTER 3
Civil Proceedings

Part V—Trial (MCR Subchapter 2.500)

3.38 Jury Selection

N. Standard of Review

Replace the third paragraph on page 216 with the following text:

In order to determine the proper standard of review of a trial court's *Batson* ruling, the appellate court must determine which step of the *Batson* challenge determination is being reviewed. In *People v Knight*, ___ Mich ___, ___ (2005), the Michigan Supreme Court clarified the standards of review for each stage as follows:

> "If the first [*Batson*] step is at issue (whether the opponent of the challenge has satisfied his burden of demonstrating a prima facie case of discrimination), we review the trial court's underlying factual findings for clear error, and we review questions of law de novo. If *Batson's* second step is implicated (whether the proponent of the peremptory challenge articulates a race-neutral explanation as a matter of law), we review the proffered explanation de novo. Finally, if the third step is at issue (the trial court's determinations whether the race-neutral explanation is a pretext and whether the opponent of the challenge has proved purposeful discrimination), we review the trial court's ruling for clear error."

CHAPTER 4

Criminal Proceedings

Part I—Preliminary Proceedings (MCR Subchapters 6.000 and 6.100)

4.5 Attorneys—Waiver of Counsel

A. Right of Self-Representation

Insert the following text after the July 2005 update to page 283:

A defendant's waiver of counsel may be voluntary and unequivocal even when the defendant admitted "[he] would rather not represent [him]self" but decided to do so because *pro se* representation provided him with greater access to police reports and other information not otherwise available to him when he was represented by counsel. *Jones v Jamrog*, ___ F3d ___, ___ (CA 6, 2005).

CHAPTER 4
Criminal Proceedings

Part IV—Pleas (MCR Subchapter 6.300)

4.31 Felony Plea Proceedings

B. Plea Requirements

1. An Understanding Plea

On page 385, replace the paragraph immediately before "**2. A Voluntary Plea**" with the following text:

The court may, orally or in writing, advise one or more defendants at the same time of the guilty plea rights in MCR 6.302(B). If a writing is used to advise a defendant of his or her rights, the information must appear on a form approved by the State Court Administrator. MCR 6.302(B)(3).* "If a court uses a writing, the court shall address the defendant and obtain from the defendant orally on the record a statement that the rights were read and understood and a waiver of those rights. The waiver may be obtained without repeating the individual rights." *Id*.

*Effective July 13, 2005.

CHAPTER 4

Criminal Proceedings

Part IV—Pleas (MCR Subchapter 6.300)

4.35 Withdrawal of a Guilty Plea

G. Appealing a Guilty Plea

Add the following language to the July 2005 update to pages 394-395:

*Appeal from a misdemeanor case.

Effective July 13, 2005, MCR 6.425 and MCR 6.625* were amended to comply with *Halbert v Michigan*, 545 US ___ (2005).

CHAPTER 4
Criminal Proceedings

Part V—Trials (MCR Subchapter 6.400)

4.38 Jury Trial

C. Voir Dire

2. Peremptory Challenges

Insert the following text after the first full paragraph on page 407:

A prima facie showing of discrimination under *Batson* does not require a showing that peremptory challenges were more likely than not based on impermissible group bias. *Johnson v California*, 545 US ___, ___ (2005). The first step in a *Batson* challenge requires the opponent of the challenge to show that members of a cognizable racial group are being peremptorily removed. In *Johnson*, California required "at step one that 'the objector [] show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias.'" The Supreme Court found that California's "'more likely than not' standard is an inappropriate yardstick by which to measure the sufficiency of a prima facie case." The Court held that "a defendant satisfies the requirements of *Batson's* first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred."

Replace the paragraph before the beginning of subsection (D) on page 407 with the following language:

A trial court may sua sponte raise a *Batson* issue to ensure the equal protection rights of individual jurors. *People v Bell*, ___ Mich ___, ___ (2005).

CHAPTER 4

Criminal Proceedings

Part V—Trials (MCR Subchapter 6.400)

4.38 Jury Trial

I. Standard of Review

Replace the last sentence of the second paragraph on page 409 with the following text:

In order to determine the proper standard of review of a trial court's *Batson* ruling, the appellate court must determine which step of the *Batson* challenge determination is being reviewed. In *People v Knight*, ___ Mich ___, ___ (2005), the Michigan Supreme Court clarified the standards of review for each stage as follows:

> "If the first [*Batson*] step is at issue (whether the opponent of the challenge has satisfied his burden of demonstrating a prima facie case of discrimination), we review the trial court's underlying factual findings for clear error, and we review questions of law de novo. If *Batson's* second step is implicated (whether the proponent of the peremptory challenge articulates a race-neutral explanation as a matter of law), we review the proffered explanation de novo. Finally, if the third step is at issue (the trial court's determinations whether the race-neutral explanation is a pretext and whether the opponent of the challenge has proved purposeful discrimination), we review the trial court's ruling for clear error."

CHAPTER 4

Criminal Proceedings

Part VI—Sentencing and Post-Sentencing (MCR Subchapters 6.400 and 6.500)

4.54 Sentencing—Felony

A. Presentence Investigation Report (PSIR)

Insert the following text after the first sentence in the paragraph at the bottom of page 448:

A trial court must provide the prosecutor and the defendant's attorney, or the defendant if he or she is not represented by an attorney, with copies of the presentence report at a reasonable time before sentencing. MCR 6.425(B).*

*Effective July 13, 2005. Prior to that time, a court was not required to provide copies to the parties.

Insert the following text at the top of page 449 before the first full paragraph:

Proposed guidelines scoring must accompany the presentence report. MCR 6.425(D).*

*Effective July 13, 2005. In addition, courts are no longer required to complete a SIR form and return it to the State Court Administrator.

Insert the following text at the top of page 449 before the paragraph beginning, "Once a defendant challenges...":

MCR 6.425(E)(2)* states:

*Effective July 13, 2005. MCR 6.425(E)(2) was formerly MCR 6.425 (D)(3).

> "(2) *Resolution of Challenges.* If any information in the presentence report is challenged, the court must allow the parties to be heard regarding the challenge, and make a finding with respect to the challenge or determine that a finding is unnecessary because it will not take the challenged information into account in sentencing. If the court finds merit in the challenge or determines that it will not take the challenged information into account in sentencing, it must direct the probation officer to
>
> > "(a) correct or delete the challenged information in the report, whichever is appropriate, and

"(b) provide defendant's lawyer with an opportunity to review the corrected report before it is sent to the Department of Corrections."

CHAPTER 4

Criminal Proceedings

Part VI—Sentencing and Post-Sentencing (MCR Subchapters 6.400 and 6.500)

4.54 Sentencing—Felony

B. Sentencing Guidelines

Add the following text to the second paragraph on page 449:

If a trial court imposes a sentence that is not within the recommended guidelines range, the court must "articulate the substantial and compelling reasons justifying that specific departure[.]" MCR 6.425(E)(1)(e).*

*Effective July 13, 2005. The court need no longer commit its departure reasons to an SIR. See ADM 1988-4, as amended.

CHAPTER 4

Criminal Proceedings

Part VI—Sentencing and Post-Sentencing (MCR Subchapters 6.400 and 6.500)

4.54 Sentencing—Felony

F. Appeal Rights

Insert the following text after the July 2005 update to page 455:

Immediately after imposing sentence on a defendant convicted by plea, the court must advise the defendant that if he or she is financially unable to retain an attorney, the defendant may request appointed counsel for purposes of appeal. MCR 6.425(F)(2)(b).* Requests for counsel made within 42 days after sentencing should be liberally granted. MCR 6.425(G)(1)(c).

*Effective July 13, 2005, MCR 6.425 was amended to comply with *Halbert v Michigan*, 545 US ___ (2005).

CHAPTER 4

Criminal Proceedings

Part VI—Sentencing and Post-Sentencing (MCR Subchapters 6.400 and 6.500)

4.60 Probation Violation

D. Plea

Replace the first sentence on page 469 with the following:

The probationer may plead guilty to the violation. MCR 6.445.*

*Effective July 13, 2005.

E. Sentencing

Insert the following language after the July 2005 update to page 469:

Because the rule in *People v Hendrick*, 472 Mich 555 (2005), was clearly foreshadowed by the unambiguous language in MCL 771.4 and MCL 769.34(2), it applies retroactively. *People v Parker*, ___ Mich App ___, ___ (2005).

APPENDIX

Checklists, Scripts, Forms

Effective July 13, 2005, Administrative Order 2003-04 amended MCR 6.302, 6.425 and 6.445. The following scripts and checklists have been updated to reflect the rule changes:

- FELONY PLEA, Script/Checklist
- FELONY SENTENCING, Script/Checklist
- FELONY PROBATION VIOLATION – SENTENCING, Checklist

Replace the above-mentioned scripts/checklists with the following scripts/ checklists.

FELONY PLEA

SCRIPT/CHECKLIST
MCL 768.35
MCR 6.302

SWEAR THE DEFENDANT.

Are you _____?

Is Mr./Ms. _____ your lawyer?

Have you had a full and complete opportunity to consult with your lawyer about this case before coming into court today?

(To the prosecutor): Is there a plea agreement?

(To the defense attorney): Is that the plea agreement? (Make sure also waive reading of Information, if plea at time of arraignment.)

(To the defendant): Did you hear and understand the plea agreement placed on the record by the lawyers?

Is this what you have agreed to do?

Do you ask that I accept the plea agreement?

(Address any Cobbs agreement. Confirm the sentence discussions were initiated by one of the parties, and identify the party. Confirm that the other party was present for the discussions or agreed that they could occur. Confirm the maximum sentence agreed to by the court based on the preliminary evaluation of the case. Confirm the defendant may withdraw the plea if the court decides to impose a sentence greater than that agreed upon.)

Are you presently on probation or parole? (If the answer is "yes", determine why and explain this may have an impact on the probation or parole status and may also affect the possible sentence. The prosecuting attorney has a duty to advise regarding consecutive sentencing.)

You are charged with _____ (describe the felony).
This felony carries a maximum possible sentence of _____. (Also state mandatory minimum sentence if required. Advise if offense is non-probationable.)

(Explain the plea agreement to the defendant. In possible probation cases, may want to explain the possibility of up to one year in the county jail as a condition of probation.)

(To the defendant): With all of this in mind how do you plea to the charge?

If your plea is accepted, you will not have a trial of any kind, and so you are giving up rights you would have had at a trial including these rights:

To be tried by a jury;

To be presumed innocent until proved guilty;

To have the prosecutor prove beyond a reasonable doubt that you are guilty;

To have the witnesses against you appear at the trial;

To question the witnesses against you;

To have the court order any witnesses you have for your defense to appear at the trial;

To remain silent during the trial;

To not have that silence used against you; and

To testify at the trial if you want to testify.

Do you understand each of these rights?

Do you understand that if I accept your plea, you will be giving up every one of these rights?

[Option to above: If the court is using a written waiver form]
Have you read and do you understand the form explaining the rights you would have had at trial that you are giving up by pleading guilty (or no contest)?

Do you understand you are giving up every one of the rights described in that form if I accept your plea?

If I accept your plea, any appeal will be by leave of the Court of Appeals. That means there is no automatic right to appeal. Instead, you would have to ask the Court of Appeals to hear your case and it would be up to them whether they would. Do you understand that?

There are some claims you will be giving up if I accept your plea. You will give up any claim that your plea was the result of promises or threats that I am not told about today and also give up any claim that it was not your own free choice to plead (guilty or no contest). Do you understand that?

Do you understand that I am not bound to follow the sentence disposition or recommendation agreed to by the prosecutor (unless I have agreed to it) and if I choose not to follow it, you will be allowed to withdraw from the plea agreement?

(For no contest plea) do you understand that for the purposes of sentencing, I will be treating you as though you were found guilty of this offense?

Other than what we have said in court today, has anyone promised you anything if you plea guilty (or no contest)?

Has anyone threatened you to get you to plea guilty (or no contest)?

Is it your own free choice to plea guilty (or no contest) to this offense(s)?

Are you pleading guilty because you are, in fact, guilty? (if guilty plea)

On or about_____ (date) in the_____ of _____, County of _____, did you _____ (elements of offense)? (or, for elements of the offense, have them describe what they did which leads them to believe they are guilty.)

No-contest plea. A no-contest plea requires the court's consent . If the defendant pleads nolo contendere, the court may not question the defendant about participation in the crime. Instead, the court must state why a plea of nolo contendere is appropriate; and hold a hearing which can be done at that time, to establish support for a finding that the defendant is guilty of the offense. Ordinarily the attorneys will stipulate to the use of the police report or the transcript of the preliminary examination. It may also be a good idea to obtain the defendant's consent to this process.]

Counsel, do you feel that the elements of the offense charged have been fully covered by the defendant's statement of the facts?

Counsel, are either of you aware of any promises, threats or inducements related to the defendant's plea other than those already disclosed on the record?

Counsel, has the court fully complied with subsections B through D of MCR 6.302?

(To the defendant): Once again, how do you wish to plea?
The court believes that the plea made is accurate, understanding and voluntary. The court is also satisfied there is a factual basis to support a finding that you are guilty of the offense(s) charged. Therefore, the court (choose one):

a. Accepts the agreement without having considered the presentence report.

b. Takes the plea agreement under advisement.

c. Accepts the agreement after having considered the presentence report. (In which event the court must sentence the defendant to the sentence agreed to or recommended by the prosecutor.)

d. Rejects the agreement.

(Address bond).

Sentencing in this case will take place on _____.

FELONY SENTENCING

SCRIPT/CHECKLIST
MCL 769.1 et seq
MCL 771.14
MCR 6.425(D), (E) and (F)

Are you _____? MCL 768.3.

Is _____ your attorney?

Do you realize you may be sent to prison for up to ____ years or fined up to _____ dollars or both?

Are you ready to be sentenced today?

Counsel, I have scored the sentencing guidelines in this case as _____. Are there any objections to that scoring? MCR 6.425(D). (Is it stipulated that the scoring is correct?)

(To defendant's attorney) Have you and your client read the presentence report? MCR 6.425(E)(1)(a).

(Ask defense attorney, defendant and prosecutor) Are there any corrections, additions or deletions to be made in the presentence report? MCR 6.425(E)(1)(b) and (2). Corrections are governed by MCL 771.14(5) and MCR 6.425(E)(1)(b)and (2). Direct presentence report be retyped if significant changes are made.

(Ask defense counsel if they have any comment regarding sentence). MCR 6.425(E)(1)(c).

(Ask defendant if he has any comments before sentence is imposed). MCR 6.425(E)(1)(c). (While the trial judge need not specifically ask the defendant if he/she has anything to say on his/her own behalf before sentencing, it is the author's view that a direct question to the defendant is the best course of action.) See People v. Petit, 466 Mich 624, 628 (2002).

Do the people wish to be heard? MCR 6.425(E)(1)(c).

(Give the victim an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence). MCR 6.425(E)(1)(c).

(Make comments based upon the presentence report. MCR 6.425(E)(1)(d) and (e). State the reasons for the sentence: punishment, rehabilitation, protect society, deterrence People v Snow, 386 Mich 586 (1972); People v Coles, 417 Mich 523 (1983)).

(State if the sentence is within the sentencing guidelines. Advise the defendant if the sentence is a departure above the guidelines and that defendant can appeal the departure. Consider commenting that the sentence presumptively meets the test of proportionality, since it is within the guidelines. If the sentence imposed is not within the guideline range, articulate the reasons justifying that specific departure.) MCR 6.425(E)(1)(e).

(Impose sentence, following the presentence report, if using the recommendation). MCR 6.425(E)(1)(d).

> (for prison sentence): "It is the sentence of the court that you, _____, shall be forthwith committed to the Michigan Department of Corrections for the purpose of classification and shall be confined in such state penal institution as shall be duly designated for a term of not less than ____ years (not more than 2/3 of maximum) and not to exceed ____ years (maximum sentence), from and including this date. You are committed (or remanded) to the custody of the sheriff."

Give credit for time in jail if appropriate, MCR 6.425(E)(1)(d). See MCL 750.195(2), and 768,7a and .7b for exceptions.

Cover whether sentence is concurrent or consecutive, MCL 769.1h. Sentences must be concurrent absent statutory authority for consecutive sentences. People v Sawyer, 410 Mich 531, 534 (1981).

Order full restitution as required. MCR 6.425(E)(1)(f), MCL 780.766(2).

Advise of rights. MCR 6.425(F).

> (If conviction following a trial) You are entitled to appellate review of your conviction and sentence. If you are financially unable to retain a lawyer, the court will appoint a lawyer to represent you on appeal.
>
> (If conviction following a plea) You have a right to ask the Court of Appeals to review this case and to ask for a lawyer for that purpose at public expense, if you cannot afford one. (If the sentence is over the guidelines) I have imposed a minimum sentence that is over the sentencing guidelines and you also have the right to ask the Court of Appeals to review that sentence and to ask for a lawyer for that purpose at public expense, if you cannot afford one.)
>
> You are being given a form that can be used to request appellate counsel. You can use that form to request a lawyer. Your request for a lawyer must be made within 42 days after this sentencing. MCR 6.425(F)(1)(c).

Entertain motion by Prosecutor to dismiss other charges.

Cancel bond.

FELONY PROBATION VIOLATION – SENTENCING CHECKLIST

MCL 771.4
MCR 6.445

Determine whether presentence report is required or waived. A prison sentence may not be imposed without a current presentence report.

If there is a presentence report, give the attorneys and the defendant an opportunity to challenge the information in it.

State the maximum possible sentence.

State the legislative sentencing guidelines, if they apply.

State the sentencing guidelines and indicate whether they apply.,, they are a starting point for the court. [The statutory sentencing guidelines apparently do not apply since the legislation does not say that they should be used.]

Give the defendant, counsel and the victim an opportunity to make a statement.

Continue, modify, extend or revoke probation and address any terms being deleted or added. If probation is revoked, impose sentence.

Give credit for time already served, whether jail or prison sentence.

Order restitution for attorney fees, if court-appointed counsel provided.

Advise of right to appeal if there was a contested hearing or if original conviction was by trial. Otherwise advise probationer is entitled to file an application for leave to appeal.

Explain right to counsel to request appeal.

July 2005

Update: Michigan Circuit Court Benchbook

CHAPTER 4

Criminal Proceedings

Part I—Preliminary Proceedings (MCR Subchapters 6.000 and 6.100)

4.5 Attorneys—Waiver of Counsel

A. Right of Self-Representation

Insert the following text on page 283 before the last paragraph in this subsection:

Where the defendant never expressly stated that he wished to represent himself, the trial court denied the defendant's request for substitute counsel or the opportunity to retain counsel, the defendant represented himself with standby counsel at important pretrial hearings and during jury voir dire, and the defendant did not expressly waive his right to counsel until immediately before trial, the defendant was effectively denied counsel at critical stages of the criminal proceedings against him, and his conviction was reversed. *People v Willing*, ___ Mich App ___, ___ (2005).

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.11 Motion to Suppress Defendant's Statement

C. Evidentiary (*"Walker"*) Hearing

1. Voluntary, Knowing, and Intelligent Confession

Insert the following text after the first full paragraph near the top of page 301:

A defendant may make a voluntary, knowing, and intelligent waiver of his or her right against self-incrimination, even when the defendant was intoxicated and suicidal at the time of the confession. *People v Tierney*, ___ Mich App ___, ___ (2005). The *Tierney* Court affirmed the trial court's analysis of the *Cipriano* factors and emphasized that a defendant's intoxication was only one of the eleven *Cipriano* factors. The Court noted that any effect that the defendant's intoxication may have had on the defendant was significantly outweighed by other factors, including the defendant's college education, his experience with the criminal justice system, the absence of any threats, and the fact that necessities (medical care, for example) were not withheld from the defendant during police questioning.

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.11 Motion to Suppress Defendant's Statement

C. Evidentiary (*"Walker"*) Hearing

5. Waiver of *Miranda* Rights

Insert the following text after the second paragraph on page 305:

A defendant who is intoxicated and claims to be suicidal may make a valid waiver of his or her *Miranda* rights as long as the totality of circumstances supports a finding that the waiver was voluntary, and that it was made knowingly and intelligently. *People v Tierney*, ___ Mich App ___, ___ (2005). In *Tierney*, the defendant's college education and familiarity with the criminal justice system, coupled with the evidence that the defendant conducted himself in a coherent and rational manner during police questioning, supported the trial court's conclusion that the defendant's confession was voluntary and properly admitted at trial.

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.21 Search and Seizure Issues

E. Was a Warrant Required?

1. "Exigent Circumstances," "Emergency Doctrine," or "Hot Pursuit"

Insert the following text after the second full paragraph on page 340:

The emergency aid exception justified the warrantless entry of the defendant's parents' home, where officers, looking through a window in the front door to the house, saw a motionless person slumped over the kitchen table in close proximity to a rifle and ammunition. *People v Tierney*, ___ Mich App ___, ___ (2005). Based on these specific and articulable facts, officers had a reasonable belief that the person slumped over the table may have needed emergency medical assistance.

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.23 Dwelling Searches

A. Generally

Insert the following text before subsection (B) near the bottom of page 352:

Depending on the circumstances, an individual may not have a reasonable expectation of privacy in an enclosed porch through which a person must pass in order to get to the dwelling's front door. *People v Tierney*, ___ Mich App ___ (2005). In *Tierney*, the trial court conducted a fact-intensive inquiry and determined that the defendant did not have a reasonable expectation of privacy in an enclosed porch. The trial court noted that although the porch was enclosed and partially curtained, the porch area was unheated and used as a storage area, not a living area. Additionally, there was not a doorbell adjacent to the exterior porch door; instead, the dwelling's doorbell was located next to the interior door. Furthermore, a "welcome" sign hung, not next to the outer porch door, but next to the interior door. Based on the court's examination of the porch's physical attributes and the uses to which the porch was put, the trial court properly concluded that the defendant had no reasonable expectation of privacy in the porch area.

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.23 Dwelling Searches

C. Factors Involved in Dwelling Searches

4. Warrantless Entry

Insert the following text at the top of page 355 before Section 4.24:

See also *People v Tierney*, ___ Mich App ___ (2005), where the emergency aid exception justified police officers' warrantless entry into a home after the officers saw through a window in the front door that a motionless person was slumped over the kitchen table and a rifle and ammunition were in close proximity to the person.

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.24 Investigatory Stops

B. Traffic Stop

Insert the following text after the June 2005 update to page 356:

Police officers may stop a vehicle if the officers have reasonable suspicion that the vehicle was involved in criminal activity, even if the officers do not possess reasonable suspicion that the driver or owner of the vehicle was engaged in that conduct. *United States v Marxen*, ___ F3d ___, ___ (2005). Because a traffic stop under these circumstances is lawful, any evidence seized as a result of the stop is lawfully obtained, even if the items seized are unrelated to the criminal activity that prompted the traffic stop. *Marxen*, *supra* at ___.

In *Marxen*, the defendant's vehicle was identified as the car used by suspects in an armed robbery. Although the defendant did not match the description of either of the suspects and police had not observed the defendant interact with either of the suspects during their post-robbery surveillance of the defendant, the investigative traffic stop that occurred eleven days after the robbery did not violate the defendant's constitutional rights. During the stop, which was based solely on the fact that the vehicle's description and license plate matched that of the car used in the robbery, police officers noticed a marijuana pipe and a bag of marijuana in plain view in the defendant's car. Because the stop was lawful, the seizure of the unlawful items—seen by officers who were lawfully in a position to see them—was also proper. *Marxen, supra* at ___.

CHAPTER 4

Criminal Proceedings

Part IV—Pleas (MCR Subchapter 6.300)

4.31 Felony Plea Proceedings

E. Standard of Review

Replace the third paragraph on page 387 and the March 2005 update to page 387 with the following text:

In *Halbert v Michigan*, 545 US ___ (2005), the United States Supreme Court concluded that an indigent defendant convicted by plea may not be denied the appointment of appellate counsel to seek a discretionary appeal of his or her conviction. *Halbert* overrules the Michigan Supreme Court's decisions in *People v Harris*, 470 Mich 882 (2004) and *People v Bulger*, 462 Mich 495 (2000), and it nullifies MCL 770.3a, the statutory provision that addresses the appointment of counsel to indigent defendants convicted by plea.

Specifically, the *Halbert* Court noted that an appeal by right or by leave to Michigan's intermediate appellate court (the Court of Appeals) constituted a first-tier review of a defendant's case, the disposition of which, to some degree, entailed an adjudication of its merits. *Halbert, supra* at ___. Due process and equal protection demand that an indigent defendant not be deprived of counsel in advancing what will most likely be the only direct review the defendant's plea-based conviction and sentence will receive. *Halbert, supra* at ___.

CHAPTER 4
Criminal Proceedings

Part IV—Pleas (MCR Subchapter 6.300)

4.35 Withdrawal of a Guilty Plea

G. Appealing a Guilty Plea

Replace the text on pages 394 and 395 and the March 2005 update to those pages with the following text:

In *Halbert v Michigan*, 545 US ___ (2005), the United States Supreme Court concluded that an indigent defendant convicted by plea may not be denied the appointment of appellate counsel to seek a discretionary appeal of his or her conviction. *Halbert* overrules the Michigan Supreme Court's decisions in *People v Harris*, 470 Mich 882 (2004) and *People v Bulger*, 462 Mich 495 (2000), and it nullifies MCL 770.3a, the statutory provision that addresses the appointment of counsel to indigent defendants convicted by plea.

Specifically, the *Halbert* Court noted that an appeal by right or by leave to Michigan's intermediate appellate court (the Court of Appeals) constituted a first-tier review of a defendant's case, the disposition of which, to some degree, entailed an adjudication of its merits. *Halbert, supra* at ___. Due process and equal protection demand that an indigent defendant not be deprived of counsel in advancing what will most likely be the only direct review the defendant's plea-based conviction and sentence will receive. *Halbert, supra* at ___.

CHAPTER 4

Criminal Proceedings

Part V—Trials (MCR Subchapter 6.400)

4.41 Confrontation

A. Defendant's Right of Confrontation

4. Unavailable Witness

Insert the following text after the first paragraph near the top of page 415:

In *United States v Arnold*, ___ F3d ___ (CA 6, 2005), the Sixth Circuit expounded on the Supreme Court's discussion of testimonial evidence in *Crawford v Washington*, 541 US 36, 50–62 (2004), by examining the dictionary definitions of the terms "testimony" and "testimonial." In *Arnold*, the court noted that "[t]he Oxford English Dictionary ('OED') defines 'testimonial' as 'serving as evidence; conducive to proof;' as 'verbal or documentary evidence;' and as '[s]omething serving as proof or evidence.' . . . The OED defines 'testimony' as '[p]ersonal or documentary evidence or attestation in support of a fact or statement; hence, *any form of evidence or proof*.' (emphasis added)." The Court further noted that Webster's Third New International Dictionary of the English Language "defines 'testimonial' as 'something that serves as evidence: proof.'" The dictionary definitions, coupled with *Crawford's* standard that statements made to government officers– including police—are testimonial in nature and should not be admitted when a defendant has not had the opportunity to cross-examine the declarant, compelled the *Arnold* Court to conclude that the out-of-court statements were improperly admitted against the defendant at trial.

CHAPTER 4
Criminal Proceedings

Part V—Trials (MCR Subchapter 6.400)

4.48 Jury Instructions

C. Instructions on Lesser Included Offenses

1. Necessarily Included Lesser Offenses

Insert the following text after the May 2005 update to page 433:

Assault with intent to do great bodily harm less than murder is a lesser included offense of assault with intent to commit murder; therefore, the trial court properly instructed the jury on both offenses. *People v Brown*, ___ Mich App ___, ___ (2005). In *Brown*, the defendant fired a gun toward several individuals, three of whom were injured, and one of whom suffered serious and permanent injuries. The defendant asserted that assault with intent to do great bodily harm less than murder was a cognate lesser offense of assault with intent to commit murder and objected to the trial court's decision to instruct the jury on the lesser charge. A majority of the *Brown* panel concluded that the specific intent necessary for the offense of assault with intent to do great bodily harm less than murder was "completely subsumed" by the specific intent necessary for the offense of assault with intent to commit murder.

CHAPTER 4

Criminal Proceedings

Part VI—Sentencing and Post-Sentencing (MCR Subchapters 6.400 and 6.500)

4.54 Sentencing—Felony

B. Sentencing Guidelines

Insert the following text after the partial paragraph at the top of page 450:

A trial court may properly consider an individual's postprobation conduct when imposing a sentence of imprisonment following revocation of the individual's probation. *People v Hendrick*, ___ Mich ___, ___ (2005). A court may look to an individual's postprobation conduct to determine whether substantial and compelling reasons warrant a departure from the minimum sentence range recommended under the legislative guidelines. *Hendrick, supra* at ___.

An individual's probation violation alone—without regard to the specific conduct underlying the violation—may constitute a substantial and compelling reason to depart from the sentencing guidelines. *People v Schaafsma*, ___ Mich App ___, ___ (2005). According to the *Schaafsma* Court:

> "[A]ny probation violation represents an affront to the court and an indication of an offender's callous attitude toward correction and toward the trust the court has granted the probationer. The violation itself is objective and verifiable, so we see no reason why a court must focus exclusively on the underlying conduct, especially since the conduct itself may be punished in a separate proceeding. We conclude that the offender's probation violation itself is an objective and verifiable factor worthy of independent consideration. Since the probation violation is objective and verifiable, in its discretion the trial court may conclude that the factor provides a substantial and compelling reason to depart from the sentencing guidelines." *Schaafsma, supra* at ___.

CHAPTER 4

Criminal Proceedings

Part VI—Sentencing and Post-Sentencing (MCR Subchapters 6.400 and 6.500)

4.54 Sentencing—Felony

F. Appeal Rights

Delete the first three paragraphs of this subsection and the March 2005 update to page 455 and insert the following text:

In *Halbert v Michigan*, 545 US ___ (2005), the United States Supreme Court concluded that an indigent defendant convicted by plea may not be denied the appointment of appellate counsel to seek a discretionary appeal of his or her conviction. *Halbert* overrules the Michigan Supreme Court's decisions in *People v Harris*, 470 Mich 882 (2004) and *People v Bulger*, 462 Mich 495 (2000), and it nullifies MCL 770.3a, the statutory provision that addresses the appointment of counsel to indigent defendants convicted by plea.

Specifically, the *Halbert* Court noted that an appeal by right or by leave to Michigan's intermediate appellate court (the Court of Appeals) constituted a first-tier review of a defendant's case, the disposition of which, to some degree, entailed an adjudication of its merits. *Halbert, supra* at ___. Due process and equal protection demand that an indigent defendant not be deprived of counsel in advancing what will most likely be the only direct review the defendant's plea-based conviction and sentence will receive. *Halbert, supra* at ___.

CHAPTER 4

Criminal Proceedings

Part VI—Sentencing and Post-Sentencing (MCR Subchapters 6.400 and 6.500)

4.60 Probation Violation

E. Sentencing

Replace the second paragraph on page 469 with the following text:

Whether a defendant's sentence of imprisonment is imposed immediately after conviction or after the imposition and revocation of probation, the legislative sentencing guidelines apply to that sentence when the sentencing offense was committed on or after January 1, 1999. *People v Hendrick*, ___ Mich ___, ___ (2005). In addition, MCL 771.4 permits, but does not require, a sentencing court to impose on the probationer the same penalty that could have been imposed instead of probation. Therefore, subject to any other applicable limits to a court's sentencing discretion, "it is perfectly acceptable to consider postprobation factors in determining whether substantial and compelling reasons exist to warrant an upward departure from the legislative guidelines." *Hendrick, supra* at ___.

An individual's probation violation alone—without regard to the specific conduct underlying the violation—may constitute a substantial and compelling reason to depart from the sentencing guidelines. *People v Schaafsma*, ___ Mich App ___, ___ (2005). According to the *Schaafsma* Court:

> "[A]ny probation violation represents an affront to the court and an indication of an offender's callous attitude toward correction and toward the trust the court has granted the probationer. The violation itself is objective and verifiable, so we see no reason why a court must focus exclusively on the underlying conduct, especially since the conduct itself may be punished in a separate proceeding. We conclude that the offender's probation violation itself is an objective and verifiable factor worthy of independent consideration. Since the probation violation is objective and verifiable, in its discretion the trial court may conclude that the factor provides a substantial and compelling reason to depart from the sentencing guidelines." *Schaafsma, supra* at ___.

CHAPTER 5

Appeals & Opinions

Part I—Rules Governing Appeals to Circuit Court (MCR Subchapter 7.100)

5.4 Parole Board

D. Appeal From Parole Revocation

Insert the following text before subsection (E) on page 490:

That an individual who has been denied parole cannot appeal the decision in state court is not a violation of the individual's due process rights. *Jackson v Jamrog*, ___ F3d ___, ___ (CA 6, 2005). Where MCL 791.234(9) once authorized prisoners to appeal a parole board decision, the statute now provides prosecutors and crime victims with statutory authority to appeal a parole board's granting of parole. According to the Sixth Circuit, denying prisoners judicial review of parole board decisions is constitutionally sound. The Court explained:

> "Employing the deferential rational-basis review standard in judging the statute, the district court concluded that the state's legitimate explanation—the attempt to minimize the number of frivolous prisoner appeals—rationally accounted for the differing treatment of prisoners on the one hand and prosecutors and crime victims on the other." *Jackson, supra* at ___.

June 2005

Update: Michigan Circuit Court Benchbook

CHAPTER 2

Evidence

Part IV—Hearsay (MRE Article VIII)

2.40 Hearsay Exceptions

I. Declarant Unavailable—MRE 804, MCL 768.26

Prior Testimony.

Insert the following text before the last paragraph on page 112:

A witness' statement identifying the defendants for police is a testimonial statement under *Crawford v Washington*, 541 US 36 (2004). In *United States v Pugh*, ___ F3d ___, ___ (CA 6, 2005), the defendants were convicted of several counts relating to a bank robbery. During the trial, a police officer testified that a witness identified pictures of the defendants during the witness' interview with police. The witness never testified at trial, and it is unclear whether she was unavailable or simply absent. The United States Court of Appeals for the Sixth Circuit concluded that the statement was given during a formal police interrogation, and a reasonable person would anticipate that the statement would be used against the accused for investigation and prosecution. Therefore, the statement was testimonial in nature. Further, the statement was offered for the truth of the matter asserted – that the defendants were in fact the men in the picture.

CHAPTER 3

Civil Proceedings

Part IV—Resolution Without Trial (MCR Subchapter 2.400)

3.33 Case Evaluation

H. Rejecting Party's Liability for Costs — MCR 2.403(O)

2. Actual Costs

Add the following text to the end of the second full paragraph on page 202:

In *Haliw v City of Sterling Heights (On Remand)*, ___ Mich App ___ (2005), the Court of Appeals analyzed the "interest of justice" exception under MCR 2.403(O)(11). The Court relied upon the analysis in *Luidens v 63rd Dist Court*, 219 Mich App 24 (1996), that addressed the "interest of justice" exception for purposes of sanctions under MCR 2.405(D)(3). The Court quoted its earlier opinion in *Haliw v City of Sterling Heights,* 257 Mich App 689, 706-709 (2003). Examples where the exception may apply include where an issue of first impression is involved, where the law is unsettled and substantial damages are at issue, where significant financial disparity exists between the parties, or where third persons may be significantly affected. *Haliw, supra* at 707, quoting *Luidens, supra* at 36. "Other circumstances, including misconduct on the part of the prevailing party, may also trigger this exception." *Haliw, supra*, quoting *Luidens, supra.*

The trial court did not err in denying case evaluation sanctions based upon the "interest of justice" exception where the defendant's decision to wait until after the close of proofs to move for a directed verdict based on a viable defense caused the "plaintiff and the court to expend time and resources on litigation that might have been unnecessary at the outset." *Harbour v Correctional Medical Services, Inc*, ___ Mich App ___, ___ (2005). The trial court found that the "defendant's actions constituted 'gamesmanship' that was unnecessarily costly to plaintiff, making it unjust for defendant to recover expenses it elected to create[.]" *Id.*

CHAPTER 3

Civil Proceedings

Part IV—Resolution Without Trial (MCR Subchapter 2.400)

3.33 Case Evaluation

H. Rejecting Party's Liability for Costs — MCR 2.403(O)

3. Costs Taxable in Any Civil Action—MCR 2.403(O)(6)

On page 203 immediately before sub-subsection (4), insert the following text:

In *Fansler v Richardson*, ___ Mich App ___, ____ (2005), the Court of Appeals found that a defendant is not a "prevailing party" entitled to costs from another co-defendant where the co-defendant filed a notice of nonparty fault against the defendant. In *Fansler*, the plaintiff filed a wrongful death action against IPF. IPF then filed a notice of nonparty fault pursuant to MCR 2.112(K) against the defendants Gibler and Thermogas. Summary disposition was granted in the defendants' favor, and they sought costs from co-defendant IPF. The Court of Appeals held that defendants Gibler and Thermogas were not "prevailing parties" against co-defendant IPF under MCR 2.625. The Court reasoned that "[t]he ultimate issue of fault stemming from the resolution of the [dispute] would have benefited defendants Gibler's and Thermogas' position against *plaintiffs*, but not against co-defendant IPF. Therefore, because defendants Gibler and Thermogas had no vested right to recover from co-defendant IPF, they could not be considered a 'prevailing party' under MCR 2.625 against IPF, and they had no right to tax costs against IPF." *Fansler, supra* at ___.

CHAPTER 3

Civil Proceedings

Part VI—Post-Judgment Proceedings (MCR Subchapter 2.600)

3.56 Costs

A. Authority

On page 243 immediately before subsection (B), insert the following text:

In *Fansler v Richardson*, ___ Mich App ___, ____ (2005), the Court of Appeals found that a defendant is not a "prevailing party" entitled to costs from another co-defendant where the co-defendant filed a notice of nonparty fault against the defendant. In *Fansler*, the plaintiff filed a wrongful death action against IPF. IPF then filed a notice of nonparty fault pursuant to MCR 2.112(K) against the defendants Gibler and Thermogas. Summary disposition was granted in the defendants' favor, and they sought costs from co-defendant IPF. The Court of Appeals held that defendants Gibler and Thermogas were not "prevailing parties" against co-defendant IPF under MCR 2.625. The Court reasoned that "[t]he ultimate issue of fault stemming from the resolution of the [dispute] would have benefited defendants Gibler's and Thermogas' position against *plaintiffs*, but not against co-defendant IPF. Therefore, because defendants Gibler and Thermogas had no vested right to recover from co-defendant IPF, they could not be considered a 'prevailing party' under MCR 2.625 against IPF, and they had no right to tax costs against IPF." *Fansler, supra* at ___.

CHAPTER 3

Civil Proceedings

Part VI—Post-Judgment Proceedings (MCR Subchapter 2.600)

3.58 Sanctions

D. Frivolous Claim or Defense

On page 248 after the second paragraph, insert the following text:

A trial court properly ordered sanctions against the plaintiffs and the plaintiff's attorney where the court determined that the plaintiffs "knew at the outset" of litigation that the claims were frivolous and proceeded anyway. *BJ's & Sons Const Co, Inc v Van Sickle*, ___ Mich App ___, ___ (2005).

CHAPTER 4

Criminal Proceedings

Part I—Preliminary Proceedings (MCR Subchapters 6.000 and 6.100)

4.8 Information

B. Amendments

Insert the following language after the second paragraph on page 291:

See also *People v Russell*, ___ Mich App ___, ___ (2005) (the defendant was not unfairly surprised or deprived of adequate time to prepare a defense against a charge when the charge added to the amended information was a charge presented at the defendant's preliminary examination and had been struck from the information in an earlier amendment).

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.12 Motion to Suppress Identification of Defendant

A. Generally

Insert the following text at the bottom of page 306:

If the totality of circumstances support the reliability of a witness' pretrial identification and that reliability outweighs any improper suggestiveness, the pretrial identification is properly used to advance the witness' identification of the defendant at trial. *Howard v Bouchard*, ___ F3d ___, ___ (CA 6, 2005).

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.21 Search and Seizure Issues

E. Was a Warrant Required?

5. Consent

Insert the following text after the quoted paragraph at the top of page 342:

Where the traffic stop and resulting detention were reasonable, no Fourth Amendment violation occurred and no inquiry was needed as to whether the officer effecting the stop "had an independent, reasonable, and articulable suspicion that defendant was involved with narcotics." Consequently, the defendant's consent to search his vehicle under the circumstances was valid and the evidence obtained was properly admitted against the defendant at trial. *People v Williams*, 472 Mich 308, 310 (2005).

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.21 Search and Seizure Issues

G. Is Exclusion the Remedy if a Violation Is Found?

1. Good-Faith Exception

Insert the following text after the March 2005 update to page 348:

Whether an officer's reliance on a search warrant is objectively reasonable is determined by the information contained in the four corners of the affidavit; therefore, the decision whether the good-faith exception to the exclusionary rule applies to evidence seized pursuant to an invalid warrant must be made without considering any information known to an officer but not found in the affidavit. *United States v Laughton*, ___ F3d ___, ___ (CA 6, 2005).

In *Laughton*, the good-faith exception was inapplicable because the affidavit failed to establish even a remote connection between the place to be searched and the criminal conduct prompting the search. The Sixth Circuit noted that the warrant

> "failed to make any connection between the residence to be searched and the facts of criminal activity that the officer set out in his affidavit. Th[e] affidavit also failed to indicate any connection between the defendant and the address given or between the defendant and any of the criminal activity that occurred there." *Id*. at ___.

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.22 Automobile Searches

C. Probable Cause to Search an Automobile

Insert the following case summary after the March 2005 update to page 350:

Under the circumstances presented in *People v Williams*, 472 Mich 308 (2005), no probable cause was necessary to justify the officer's questions and because the detention was reasonable, the defendant's consent to the search of the vehicle was valid. Where the traffic stop and resulting detention are reasonable, no Fourth Amendment violation occurs and no inquiry is needed as to whether the officer effecting the stop "had an independent, reasonable, and articulable suspicion that defendant was involved with narcotics." *Id*. at 318.

The Court explained that a law enforcement officer is permitted to detain a driver stopped for a traffic violation in order to question the driver about the driver's destination and travel plans. The officer's authority to ask questions extends to follow-up questions prompted by a driver's suspicious or implausible answers to questions posed by the officer. *Id*. at 316.

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.23 Dwelling Searches

B. Standing

Insert the following case summary on page 353, immediately before subsection (C):

Under Michigan law, a trespasser has no legitimate expectation of privacy in a dwelling house even when the trespasser lawfully occupied the premises at an earlier date. *United States v Hunyady*, ___ F3d ___, ___ (CA 6, 2005).

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.24 Investigatory Stops

B. Traffic Stop

Insert the following case summary on page 356, immediately before subsection (C):

Where the initial traffic stop is justified and the officer's questions do not exceed the scope of the stop and do not unreasonably extend the time of the detention, a defendant's consent to search the vehicle is valid. *People v Williams*, 472 Mich 308, 310 (2005). Under those circumstances, no Fourth Amendment violation occurs and no inquiry is needed as to whether the officer effecting the stop "had an independent, reasonable, and articulable suspicion that defendant was involved with narcotics." *Id*. at 318.

In *Williams*, the defendant was stopped by a Michigan State Police trooper for speeding. After the defendant produced his driver's license, the trooper asked where he and his two passengers were going. The defendant's answer raised the trooper's suspicion because it was implausible. Answers the defendant and the two passengers gave to the trooper were inconsistent and served only to increase his suspicions. At one point during the encounter, the defendant admitted to a previous arrest "for a marijuana-related offense." Following the five- to eight-minute detention, the trooper asked for and received the defendant's consent to search the vehicle. A canine unit arrived within three minutes, and the dog indicated that narcotics were present in the vehicle's backseat. No drugs were found there, and the defendant consented to a search of the vehicle's trunk. When the defendant later withdrew his consent, the trooper obtained a warrant, searched the trunk, and discovered marijuana and cocaine. *Id*. at 310–312.

The *Williams* Court conducted "a fact-intensive inquiry" pursuant to the standards set forth in *Terry v Ohio,* 392 US 1 (1968). According to the *Terry* standard,

> "the reasonableness of a search or seizure depends on 'whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.'" *Williams, supra* at 314. [Internal citations and footnotes omitted.]

The Court explained that a law enforcement officer is permitted to detain a driver stopped for a traffic violation in order to question the driver about the driver's destination and travel plans. The officer's authority to ask questions extends to follow-up questions prompted by a driver's suspicious or implausible answers to questions posed by the officer. *Id*. at 316.

CHAPTER 4

Criminal Proceedings

Part III—Discovery and Required Notices (MCR Subchapter 6.200)

4.30 Witnesses—Disclosure and Production

A. Res Gestae Witnesses List with Information

Replace the second paragraph beginning at the bottom of page 380 with the following text:

A prosecutor is not statutorily obligated to locate, endorse, and produce unknown witnesses who might be res gestae witnesses; a prosecutor does have a statutory duty to give notice of any known witnesses and provide reasonable assistance to locate a witness when requested by a defendant. *People v Cook*, ___ Mich App ___, ___ (2005), citing *People v Burwick*, 450 Mich 281, 289 (1995). The Court elaborated:

> "Because [*People v*] *Pearson*[, 404 Mich 698 (1979)] mandated hearings for the prosecution's breach of a duty that MCL 767.40a abolished, we hold, in answer to the question posed to us by our Supreme Court, that *Pearson* is no longer good law.[6] We further hold that an evidentiary hearing is no longer *required* simply because the prosecution did not produce a res gestae witness.

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[6] We note that there may be times when such a hearing may be appropriate. For example, MCL 767.40a(5) does require the prosecution to provide reasonable assistance in locating witnesses whose presence defendant specifically requests. A hearing of the type described by our Supreme Court in *Pearson* might be appropriate if the prosecution is found to have breached this duty."

Cook, supra at ___.

4.30 Witnesses—Disclosure and Production

D. Locating and Producing Witnesses

Replace the second full paragraph on page 382 with the following text:

A prosecutor is not statutorily obligated to locate, endorse, and produce unknown witnesses who might be res gestae witnesses; a prosecutor does have a statutory duty to give notice of any known witnesses and provide reasonable assistance to locate a witness when requested by a defendant. *People v Cook*, ___ Mich App ___, ___ (2005), citing *People v Burwick*, 450 Mich 281, 289 (1995).

E. Evidentiary Hearing

Replace the text on pages 382–383 with the following:

A prosecutor is not statutorily obligated to locate, endorse, and produce unknown witnesses who might be res gestae witnesses; a prosecutor does have a statutory duty to give notice of any known witnesses and provide reasonable assistance to locate a witness when requested by a defendant. *People v Cook*, ___ Mich App ___, ___ (2005), citing *People v Burwick*, 450 Mich 281, 289 (1995). The Court elaborated:

> "Because [*People v*] *Pearson*[, 404 Mich 698 (1979)] mandated hearings for the prosecution's breach of a duty that MCL 767.40a abolished, we hold, in answer to the question posed to us by our Supreme Court, that *Pearson* is no longer good law.[6] We further hold that an evidentiary hearing is no longer *required* simply because the prosecution did not produce a res gestae witness.
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> [6] We note that there may be times when such a hearing may be appropriate. For example, MCL 767.40a(5) does require the prosecution to provide reasonable assistance in locating witnesses whose presence defendant specifically requests. A hearing of the type described by our Supreme Court in *Pearson* might be appropriate if the prosecution is found to have breached this duty."
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>
> *Cook, supra* at ___.

CHAPTER 4

Criminal Proceedings

Part VI—Sentencing and Post-Sentencing (MCR Subchapters 6.400 and 6.500)

4.54 Sentencing—Felony

B. Sentencing Guidelines

Insert the following text after the first full paragraph on page 450:

Although the ameliorative changes made to the sentencing provisions in MCL 333.7401 do not apply retrospectively, a sentencing court should consider whether it is appropriate to tailor a defendant's sentence to reflect the Legislature's more lenient sentencing policy. *People v Michielutti*, ___ Mich App ___, ___ (2005). In addition to any other proper factors, "the new, ameliorative legislative policy qualifies as an objective and verifiable reason to deviate from the former mandatory sentence" and may contribute to the substantial and compelling reasons for a court's departure from a previous mandatory sentence. *Id*. at ___.

D. Imposition of Sentence

Insert the following text at the bottom of page 450:

When a defendant presents (at his or her sentencing hearing) objective and verifiable factors in support of a downward sentence departure, the court must address on the record all applicable factors raised and indicate whether any of the factors influenced the court's ultimate sentencing decision. *People v Michielutti*, ___ Mich App ___, ___ (2005). According to the *Michielutti* Court, "the seriousness of imposing a mandatory ten-year sentence compels some measure of reasonable disclosure[.]" *Id*. at ___, citing *People v Triplett*, 432 Mich 568, 572–573 (1989).

CHAPTER 5

Appeals & Opinions

Part I—Rules Governing Appeals to Circuit Court (MCR Subchapter 7.100)

5.1 District Court

C. Motions for Rehearing or Reconsideration

On page 483, insert a new subsection (C) containing the following text:

A circuit court, acting as an appellate court in review of a district court order or judgment, possesses the authority to reconsider its own previous order or judgment on the matter. *People of the City of Riverview v Walters*, ___ Mich App ___, ___ (2005).

Palpable error is not a mandatory prerequisite to a court's decision to grant a party's motion for reconsideration. *Id*. at ___. Adherence to the palpable error provision contained in MCR 2.119(F)(3) is not required; rather, the provision offers guidance to a court by suggesting when it may be appropriate to grant a party's motion for reconsideration. *Walters, supra* at ___.

Where a different judge is seated in the circuit court that issued the ruling or order for which a party seeks reconsideration, the judge reviews the prior court's factual findings for clear error. *Id*. at ___. The fact that the successor judge is reviewing the matter for the first time does not authorize the judge to conduct a de novo review. *Id*. at ___.

CHAPTER 5

Appeals & Opinions

Part II—Tools for Deciding Appeals to Circuit Court

5.9 Law of the Case

B. Law of the Case

Insert the following text after the second paragraph on page 500:

The law of the case doctrine does not apply to trial courts; a trial court possessed unrestricted discretion in reviewing prior decisions made by the court. *Prentis Family Foundation v Karmanos Cancer Institute*, ___ Mich App ___, ___ (2005).

May 2005

Update: Michigan Circuit Court Benchbook

CHAPTER 2

Evidence

Part IV—Hearsay (MRE Article VIII)

2.40 Hearsay Exceptions

I. Declarant Unavailable—MRE 804, MCL 768.26

Prior Testimony.

Insert the following text after the quoted paragraph near the bottom of page 112:

Admission of an unavailable witness's statement does not violate the Confrontation Clause if the defendant caused the witness to be unavailable. In *United States v Garcia-Meza,* ___ F3d ___, ___ (CA 6, 2005), the defendant admitted killing his wife but argued that he did not possess the requisite intent to be convicted of first-degree murder. The trial court admitted as excited utterances the victim's statements made to police after a prior assault. The defendant argued that the victim's statements were inadmissible under *Crawford v Washington*, 541 US 36 (2004). The Sixth Circuit rejected this argument and stated:

> "[T]he Defendant has forfeited his right to confront [the victim] because his wrongdoing is responsible for her unavailability. *See Crawford*, 541 U.S. 36, 124 S. Ct. at 1370 ('[T]he rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds'); *Reynolds v. United States,* 98 U.S. 145, 158–59 (1879) ('The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence

> is admitted to supply the place of that which he has kept away. . . . The rule has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong.')."

The *Garcia-Meza* Court also rejected the defendant's assertion that forfeiture only applies when a criminal defendant kills or otherwise prevents a witness from testifying with a specific intent to prevent him or her from testifying. Although FRE 804(b)(6) (and MRE 804(b)(6)) may contain this requirement, it is not a requirement of the Confrontation Clause. *Garcia-Meza, supra* at ___.

CHAPTER 3

Civil Proceedings

Part IV—Resolution Without Trial (MCR Subchapter 2.400)

3.35 Settlements

Add the following new subsection (G) on page 207:

G. Disclosure of Settlement

In a case of first impression, the Court of Appeals held the trial court has discretion to disclose to the jury the existence of "high-low" settlements between the plaintiff and some defendants who remain in the case. *Hashem v Les Stanford Oldsmobile, Inc,* ___ Mich App ___, ___ (2005). Such "high-low" or "Mary Carter" agreements distort the adversarial process, undermining the right to a fair trial. The interest of fairness served by disclosure to the jury of the true alignment of the parties must be weighed against the countervailing interest in encouraging settlements and avoiding prejudice to the parties. *Id.* at ___. "[T]he trial court has both a duty and the discretion to fashion procedures that ensure fairness to all litigants in these situations." *Id.* at ___. A Mary Carter agreement is not a release, so the settling defendant remains in the case, but the argreement limits the settling defendant's potential liability and provides that defendant an incentive to assist the plaintiff's case against the other defendants. The agreement is kept secret from the other parties and the court. See *Smith v Childs,* 198 Mich App 94, 97-98 (1993).

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.14 Double Jeopardy

B. Multiple Prosecutions for the Same Offense

Successive State and Federal Prosecutions.

On page 316, replace the text in this paragraph with the following:

The Double Jeopardy Clause does not bar successive state and federal prosecutions of a defendant for offenses arising from the same criminal episode. *People v Davis*, 472 Mich 156, 162 (2005), citing *Bartkus v Illinois*, 359 US 121 (1959). Because federal and state prosecutorial authority is derived from two distinct and independent sources, a defendant whose conduct violates both federal and state law commits two offenses subject to punishment by both sovereigns. *Davis, supra*.

Add the following text to the bottom of page 316:

The "Separate Sovereign" Rule. The dual sovereignty rule for successive federal and state prosecutions also applies to cases involving successive state prosecutions. Double jeopardy does not prohibit successive state prosecutions where a defendant's conduct violates the law in more than one state and more than one state seeks to prosecute the defendant for a crime resulting from that conduct. *People v Davis*, 472 Mich 156, 158 (2005). In *Davis*, the Double Jeopardy Clause did not bar the State of Michigan from prosecuting a defendant who had already been convicted and sentenced in Kentucky for offenses under Kentucky law that arose from the same conduct on which Michigan based its charges against the defendant. Successive state prosecutions do not violate a defendant's double jeopardy protections if the entities involved are "separate sovereigns." A state is a sovereign separate from another state when it derives its prosecutorial authority from a source independent of the other state's source of authority. *Id.* at 166–167.

C. Multiple Punishments for the Same Offense

Insert the following text on page 317, before the beginning of subsection (D):

See also *People v Meshell*, ___ Mich App ___, ___ (2005), where the Court concluded that the Legislature did *not* intend multiple punishments when a defendant was convicted of both operating/maintaining a methamphetamine laboratory and operating/maintaining a methamphetamine laboratory within 500 feet of a residence. Under the "same-elements" test, there exists a presumption that the Legislature did not intend multiple punishments because all the elements of one offense are contained in the elements of the other offense. Further evidence that multiple punishments were not intended is found in the statutory language that provides for more severe punishment when the conduct prohibited under MCL 333.7401c(2)—operating/ maintaining a methamphetamine laboratory—occurs in certain locations or under certain circumstances (e.g., in the presence of a minor, involving possession or use of a firearm, etc.).

CHAPTER 4

Criminal Proceedings

Part V—Trials and Post-Trial Proceedings (MCR Subchapter 6.400)

4.43 Defendant's Conduct and Appearance at Trial

A. Presumption of Innocence

2. Handcuffs/Shackles

Insert the following text after the first full paragraph on page 418:

An appellate court's harmless error analysis requires more than a cursory review of the totality of circumstances under which a defendant was convicted when no justification existed for shackling a defendant during his jury trial. *Ruimveld v Birkett*, ___ F3d ___ (CA 6, 2005).

In *Ruimveld*, the Michigan Court of Appeals concluded that although the defendant was improperly shackled during trial, the error was harmless. The Sixth Circuit Court of Appeals noted that the Michigan Court failed to conduct a meaningful review of the circumstances surrounding the defendant's conviction, which, according to the Sixth Circuit, clearly showed that the defendant's shackling likely had a substantial and injurious effect on the jury's verdict. The Sixth Circuit pointed out that the Michigan Court failed to consider the fact that "[t]he evidence against [the defendant] was merely circumstantial . . . that the jury deliberated for over three hours despite the simple facts, and made inquiries to the judge regarding presumptions of innocence, burdens of proof, and reasonable doubt. Given the closeness of the case, the effect of any error was thus likely to be magnified." *Id.* at ___.

CHAPTER 4

Criminal Proceedings

Part V—Trials and Post-Trial Proceedings (MCR Subchapter 6.400)

4.48 Jury Instructions

C. Instructions on Lesser-Included Offenses

1. Necessarily Included Lesser Offenses

Insert the following text before the last paragraph on page 433:

See also *People v Walls*, ___ Mich App ___, ___ (2005), where the Court concluded that felonious assault (MCL 750.82) is a cognate lesser offense of assault with intent to rob while armed (MCL 750.89) and not a necessarily included lesser offense as the defendant argued. Whereas a conviction for felonious assault requires that the offender possess a dangerous weapon, a conviction for assault with intent to rob while armed may be based on the offender's possession of "any article used or fashioned in a manner to lead a person so assaulted reasonably to believe it to be a dangerous weapon." MCL 750.89. Because conviction of felonious assault (lesser offense) requires possession of a dangerous weapon and conviction of assault with intent to rob while armed (greater offense) does not require possession of a dangerous weapon, it is possible to commit the greater offense without first committing the lesser offense. *Walls, supra* at ___.

CHAPTER 4

Criminal Proceedings

Part VI—Sentencing and Post-Sentencing (MCR Subchapters 6.400 and 6.500)

4.60 Probation Violation

F. Appeal Rights

Replace the paragraph at the bottom of page 469 with the following text:

*Effective May 1, 2005.

On the record and immediately after imposing a sentence that involves incarceration, the court must advise the probationer of his or her appellate rights. If the underlying conviction resulted from a trial, the probationer has an appeal of right. MCR 6.445(H)(1)(a).* If the underlying conviction resulted from a guilty or nolo contendere plea, the probationer is entitled to file an application for leave to appeal. MCR 6.445(H)(1)(b).

April 2005

Update: Michigan Circuit Court Benchbook

CHAPTER 2

Evidence

Part I—General Matters (MRE Articles I, II, III, V, and XI)

2.7 Presumptions

A. Civil Case—MRE 301

Insert the following text on page 32 immediately before subsection (B):

If evidence is introduced to rebut a presumption, "the presumption dissolves, but the underlying inferences remain to be considered by the jury[.]" *Ward v Consolidated Rail Corporation*, ___ Mich ___, ___ (2005). In *Ward*, the defendant introduced evidence that missing evidence was disposed of as part of a routine business practice, thereby rebutting the presumption that the missing evidence was intentionally made unavailable. Missing evidence only gives rise to an adverse presumption when the complaining party can establish intentional conduct showing fraud or a desire to suppress the truth. Thus, the Court held that "the trial court erred when it instructed the jury that it could draw an adverse inference, but failed to explain that no inference should be drawn if defendant had a reasonable excuse for its failure to produce the evidence."

CHAPTER 2

Evidence

Part IV—Hearsay (MRE Article VIII)

2.40 Hearsay Exceptions

I. Declarant Unavailable—MRE 804, MCL 768.26

Insert the following text before the last paragraph on page 112:

In *People v Walker,* ___ Mich App ___, ___ (2005), the Court of Appeals held that a crime victim's statements to a neighbor and a police officer do not constitute "testimonial statements" for purposes of the Confrontation Clause. In *Walker*, the defendant beat the victim and threatened to kill her. The victim jumped from a second-story balcony and ran to a neighbor's house, and the neighbor called the police. The victim made statements to the neighbor, who wrote out the statements and gave them to the police. The victim did not appear for trial, and her statements were admitted under the excited utterance exception to the hearsay rule. The defendant argued that pursuant to *Crawford v Washington,* 541 US 36 (2005), admission of the victim's statements violated the Confrontation Clause because they were "testimonial statements." The Court rejected the defendant's argument and stated:

> "We discern no holding or analysis in *Crawford* that would lead us to conclude that the victim's statements to her neighbor, and the repetition of her statements to responding police officers, were testimonial hearsay violative of the Confrontation Clause."

CHAPTER 2
Evidence

Part IV—Hearsay (MRE Article VIII)

2.40 Hearsay Exceptions

I. Declarant Unavailable—MRE 804, MCL 768.26

Insert the following text after the March 2005 update to this subsection:

In *People v Ware*, ___ Mich App ___, ___ (2005), the Court of Appeals stated in dicta that *Crawford v Washington*, 541 US 36 (2004), does not prohibit the admission of a witness's statement under MRE 804(b)(6). MRE 804(b)(6) allows the admission of a statement against a party if that party has engaged in or encouraged wrongdoing that was intended to and did in fact make the declarant unavailable as a witness. In *Ware*, the defendant killed the victim and then stated to the witnesses "[i]f this shit go any further y'all next." A witness failed to appear at trial, and her statements were admitted under MRE 804(b)(6). In affirming the trial court's admission of the statements under MRE 804(b)(6), the Court of Appeals stated the following:

> "[T]he United States Supreme Court in *Crawford v Washington*, 541 US 36[] (2004) sought to reinforce the criminal defendant's Sixth Amendment right to confront a witness offered against him. *Crawford* is absent of language concerning the circumstances of a witness's unavailability, when such unavailability was caused by the defendant. From a practical standpoint, it would be grossly unfair to allow a defendant in a criminal matter to cause an adverse witness to be unavailable, and then assert a Sixth Amendment violation arguing a *Crawford*-type violation. To allow otherwise would facilitate threats or acts by a criminal defendant, against a potential witness, in order to prohibit statements or testimony, and thereby grant a criminal defendant a 'constitutional defense' against all statements made by a witness who was unavailable at the time of trial."

CHAPTER 2

Evidence

Part IV—Hearsay (MRE Article VIII)

2.41 Statement of Co-Defendant or Co-Conspirator

D. Cautionary Instruction—CJI 2d 5.6

On page 116, replace the first sentence in this subsection with the following text:

Whether to give a cautionary accomplice instruction is within the trial court's discretion. *People v Young*, ___ Mich ___, ___ (2005). In *Young*, the Court overturned the *McCoy** rule, which required the trial court to give the jury a cautionary instruction about accomplice testimony whenever requested by the defendant. Under *McCoy*, a trial court's failure provide the jury instruction required reversal of the conviction. According to the *Young* Court, MCL 768.29 clearly provides that the jury instructions are within the trial court's discretion.

**People v McCoy*, 392 Mich 231 (1974).

CHAPTER 3

Civil Proceedings

Part VII—Rules Governing Particular Types of Actions (Including MCR Subchapters 3.300 – 3.600)

3.62 Contracts

On page 253, before subsection (A), insert the following text:

Effective March 12, 2005, the Committee on Model Civil Jury Instructions adopted new jury instructions for use in contracts cases, M Civ JI 142.01–142.55. The new jury instructions may be viewed online at www.courts.mi.gov/mcji/adopted-instructions/ch142.htm.

CHAPTER 4

Criminal Proceedings

Part VI—Sentencing and Post-Sentencing (MCR Subchapters 6.400 and 6.500)

4.54 Sentencing—Felony

B. Sentencing Guidelines

After the second paragraph of this subsection, add the following text:

"[A] sentence that exceeds the sentencing guidelines satisfies the requirements of MCL 769.34(3) when the record confirms that the sentence was imposed as part of a valid plea agreement. Under such circumstances, the statute does not require the specific articulation of additional 'substantial and compelling' reasons by the sentencing court." *People v Wiley,* ___ Mich ___, ___ (2005). "[A] defendant waives appellate review of a sentence that exceeds the guidelines by understandingly and voluntarily entering into a plea agreement to accept that specific sentence." *Id.*